

EEOC *circa* 2016: Legal Update & Developments



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Busy Times for EEOC

- EEOC Select Taskforce on the Study of Harassment in the Workplace
- Enforcement Guidance on Retaliation and Related Issues
- Backlash Discrimination
- Gender stereotyping/Sexual orientation
- Arrests/Convictions & Background Checks
- EEO-1 Reporting & Inclusion of Pay Data
- Pattern or Practice Actions: Sections 706 & 707
- Q&A

EEOC Select Task Force on the Study of Harassment in the Workplace

- March, 2015

EEOC Select Task Force on the Study of Harassment in the Workplace

- Led by Commissioners Chai Feldblum and Victoria Lipnic
- The Task Force is examining the various forms of harassment in the workplace and identifying and promoting prevention strategies.
- Some observations:
 - Prevention starts at the top – Organizational Culture
 - If the issue is important to the boss, it will be important to everyone else
 - Studies show organizational conditions, rather than characteristics of individuals, are biggest indicators of the prevalence of harassment in the workplace (organizational tolerance)
 - Training
 - Mandatory and periodic

EEOC Select Task Force on the Study of Harassment in the Workplace

- Some observations:
 - Establish strong policy
 - What violates the policy
 - What are consequences
 - Who is responsible (management)
 - Don't forget social media
 - Establish well defined complaint procedures
 - Keep the complaining employee in the loop
 - Respond promptly/fairly
 - Report to all parties
 - Do not retaliate
 - Train investigators (often overlooked)
 - Remember, everyone is watching

EEOC Select Task Force on the Study of Harassment in the Workplace

- **Need and Import**

- In FY 2015 (10/1/14-9/30/15):

- 31% of 89,385 charges filed (just short of 28,000) alleged harassment

- Bases include Race, Age, Disability, Religion, National Origin and Sex

EEOC's FY 2015 Enforcement & Litigation Data

Common Sense

Creating and maintaining a culture of respect

RETALIATION

Statutory Basis:

704(a) of Title VII of the Civil Rights Act of 1964 prohibits retaliation against an employee or applicant who “has opposed any practice made unlawful” by Title VII, or “has made a charge, testified, assisted, or participated . . . in an investigation, proceeding, or hearing”

FY 2015 Charges by Basis

BASIS	NUMBER	PERCENT
Retaliation	39,757	44.5%
Race	31,027	34.7%
Disability	26,968	30.2%
Sex	26,396	29.5%
National Origin	9,438	10.6%
Religion	3,502	3.9%
Color	2,833	3.2%
Equal Pay Act	973	1.1%
GINA	257	0.3%

The Retaliation Trilogy

- **What is Adverse?** *Burlington N. & Santa Fe RY Co. v. White*, 548 U.S. 53 (2006)
- **What Constitutes Opposition?** *Crawford v. Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009)
- **Who is Aggrieved?** *Thompson v. North Am. Stainless, L.P.*, 562 U.S. ____ (2011)

Post-Trilogy

- Causation Standard

- *Univ. of Texas SW Medical Center v. Nassar*, 133 S. Ct. 2517 (2013)
- Follows *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (Causation Standard under ADEA)
- Court held that “but for” causation standard applies to Title VII’s anti-retaliation provision, rejecting the arguments that Title VII’s lesser “motivating factor” causation standard applies to retaliation claims

- Manager Rule

- *DeMasters v. Carilion Clinic et al.*, 796 F. 3d 409 (4th Cir. 2015)

DeMasters Title VII suit against Carilion alleging retaliation (for opposing unlawful employment practices) was dismissed on two grounds:

- (1) No activity in which DeMasters engaged by itself was protected oppositional activity &
- (2) Even if it were, the “Manager Rule” prevented any Title VII protection.

Manager Rule

The rule prevents an employee whose job responsibilities include reporting discrimination claims from seeking protection under Title VII's anti-retaliation provisions.

DeMasters, as an EAP Counselor, was covered by the Manager Rule according to the District Court.

Fourth Circuit Decision

District Court erred in two respects:

- (1) Determination of whether activity is protected requires looking at the totality of conduct; and, respecting the Manager Rule,
- (2) Although it has been applied in FLSA context, nothing in Title VII indicates that protection from retaliation turns on an employee's job duties.

Highlights of the proposed Enforcement Guidance on RETALIATION

Internal Activity: Opposition and Participation

Protection is accorded pro-ER witnesses

Harassment Complaints: Protected even if not legally cognizable (i.e., Severe or Pervasive)

Nullifies the Manager Rule

Backlash against employees who are Muslim or are perceived to be Muslim

Status Post: Paris and San Bernardino

Backlash Discrimination

- From 9/11/01 to 9/30/15
 - EEOC took 9679 charges alleging discrimination Religion – Muslim
 - Nearly 4X's the number of Religion – Muslim charges filed 11 years prior to 9/11
 - EEOC took 1054 charges alleging backlash discrimination – Muslim
 - Approximately 24% have been closed as “merit resolutions” (finding of discrimination, settlement, withdrawal with benefits)

Common Bases

- Religion (Muslim)
- AND/OR
- National Origin (Middle Eastern)

Religious Discrimination Generally

- When religion issues go bad in the workplace, they can go very bad, very quickly
- Be proactive
- Establish a culture where all beliefs are respected
 - Our beliefs define us
 - They usually cannot be negotiated or reasoned away
 - Title VII balances the individual's right to free exercise of her or his religious beliefs and the employer's right to run its organization as it chooses.
- Shows up in:
 - Expression
 - Harassment
 - Discrimination
 - Reasonable accommodations
- Respond to issues or complaints quickly and fairly

Gender Stereotyping/Gender Identity/Sexual Orientation

Gender Stereotyping

- In Price Waterhouse v Hopkins, 490 U.S. 228 (1989), the Supreme Court found that acting within the context of sex stereotyping is acting on the basis of gender.
 - Ann Hopkins was denied a partnership at the accounting firm; comments made by decision makers were that she was “macho,” should “take a course in charm school,” and should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Gender Stereotyping and Gender Identity

- “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim....This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating [Title VII]... .” *Macy v Dept of Justice, Appeal No. 0120120821 (April, 2012) at 5.*

Gender Stereotyping and Sexual Orientation

“...we conclude that sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” *Baldwin v. Foxx*, Appeal No. 0120133080 (July, 2015) at 6.

Crystal Ball View of LGBT Issues

- Litigation on the issue of sexual orientation appears to be on the horizon
 - Consistency: *Baldwin* followed on the heels of *Macy*
 - The horizon also would likely have multiple district court decisions at odds and, eventually, Circuit splits

Alternatives:

- Supreme Court Decision(s) -
- Legislation (ENDA)

Crystal Ball UPDATE

March 1st

EEOC v. Scott Medical Center (W.D. Pa.) (gay employee subjected to harassment and constructively discharged)

EEOC v. Pallet Companies d/b/a IFCO Systems NA (D. Md.) (lesbian employee subjected to harassment and retaliatory termination)

Arrest and Conviction Records

Background Checks

- Why is the Commission interested in this?
 - Using blanket policies to exclude applicants for employment based on conviction records, arrest records and credit checks may adversely impact certain protected groups
 - Reports contain errors
- Disparate Treatment
 - Don't deviate from the policy because an applicant is in a certain protected group
- Adverse Impact:
 - *Griggs v Duke Power Company* (1971)
 - Neutral policy
 - Adverse impact
 - Job related and consistent with business necessity

Background Checks

- Must show job relatedness and business necessity (*Green v Missouri Pacific Railroad*)
 - The nature and gravity of the offense or conduct;
 - The time that has passed since the offense or conduct and/or completion of the sentence; and
 - The nature of the job held or sought.
- Some level of risk is inevitable in all hiring. It's ultimately about risk management
- Must accurately distinguish between those applicants who pose an unacceptable risk and those who do not (be careful of blanket exclusions)

Background Checks

- Arrests

- An arrest does not establish that criminal conduct has occurred
- Final dispositions are often not reported
- An arrest should not be the reason for the employment decision, but the underlying conduct may be a reason, if objectively known

Background Checks (best practices)

- *Eliminate policies or practices that exclude people from employment based on any criminal record.*
- *Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.*
- *Develop a Policy*
 - Identify essential job requirements and the actual circumstances under which the jobs are performed.
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
 - Identify the criminal offenses based on all available evidence.
 - Determine the duration of exclusions for criminal conduct based on all available evidence.
 - Include an individualized assessment.
 - Record the justification for the policy and procedures.
 - Note and keep a record of consultations and research considered in crafting the policy and procedures.
 - Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

Background Checks (best practices)

- *Questions about Criminal Records*
 - When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- *Confidentiality*
 - Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

EEO-1: Inclusion of Pay Data

- Officially published in Federal Register on 2-1-16
- Comment period open until 4-1-16
- EEO-1 provides data from private sector employers on race, ethnicity, sex and job category
- Proposal would add aggregate data on **Pay Ranges** and **Hours Worked**
- EEOC's Proposal responds to recommendations from independent studies and the Commission's work with the President's National Equal Pay Task Force.

Pattern or Practice Suits

Sections 706 and 707

706: 1972 amendments to Title VII gives EEOC a cause of action if conciliation fails

Requires a charge (discrimination and/or retaliation) and conciliation (*Mach Mining* standard)

707: 1972 amendments to Title VII transferred 707 (a) authority to initiate pattern or practice suits to EEOC [707(c)]

Requires EEOC to carry out the functions in accordance with 707 (d) and (e)

Same Statute – Different Outcomes

EEOC v. CVS Pharmacy, Inc. (7th Circuit)

EEOC authority to investigate and act on a charge of a pattern or practice of discrimination shall be conducted pursuant to Section 706; citing to language of 707(e). That 707(e) applies only when EEOC is acting on a charge reads 707(e) out of Title VII.

EEOC v. Dougherty Enterprises, Inc. (S.D. Fla.)

707(a) does not require a charge of discrimination and/or retaliation; nor, conciliation. 707(a) prohibits resistance to the full enjoyment of rights secured by Title VII.

706 procedures only apply when EEOC acts on a charge pursuant to 707 (e); not when action is pursuant to 707(a)